

0001

1 C H R O N O L O G I C A L I N D E X

2 --o0o--

3 Page

4 Tuesday, January 21, 2003 9129

5 Witness for the Defendant Philip Morris:

6 JERRY FRANK WHIDBY, Ph.D.

7 Direct Examination by Mr. Barron 9132

8 Tuesday, January 21, 2003 P.M. Session: 9173

9 Cross Examination by Mr. Paul 9238

10 ---o0o---

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

0002

1 E X H I B I T S I N D E X

2 ---o0o---

3 Defendant Philip Morris

| No.   | Description  | I.D. | I.E. |
|---|--|------|------|
| CS-001068   | Atkinson, "Production of Sample Cigarettes For Tobacco and Health Research", Tobacco & Health Conference, Lexington, 2/24/70 | 9166 | ---- |
| CS-001076   | Organizational Chart, Philip Morris Research Department  | 9136 | 9137 |
| CS-001077   | Organizational Chart, Philip Morris Technology Department  | 9137 | 9138 |
| CS-001079   | Skin Painting Study of Whole-Smoke Condensates, Test Cigarettes  | 9208 | 9209 |
| CS-001092   | Rehabilitation, 32, "Smoking and Society", Russel, M.A.H.  | 9196 | 9197 |
| CS-001093   | Testimony of I. Bross before House of Representatives Intergovernmental Relations H.R. Subcommittee                          | 9191 | 9195 |
| CS-001094   | Memo, Osdene to Wakeham re visit with Dr. Burger, University of Virginia, Charlottesville, Va., 12/16/68                     | 9164 | 9165 |
| CS-001095   | NCI, "Smoking & Health: A Program to Reduce the Risk of Disease in Smokers", Status Report                                   | 9195 | ---- |
| <p>0003</p> <p>E X H I B I T S I N D E X</p> <p>---o0o---</p> |  |      |      |
| Defendant Philip Morris                                       |  |      |      |
| No.   | Description  | I.D. | I.E. |
| CS-001096   | Letter from Egle to Pages re: The Characterized Effects of Over 20 Investigational Compounds                                 | 9216 | ---- |

|    |           |                                      |      |      |
|----|-----------|--------------------------------------|------|------|
| 8  | PM-000379 | Board of Directors Presentation,     |      |      |
| 9  |           | 9/30/59 by DuPuis                    | 9153 | 9154 |
| 10 | PM-000404 | Letter from Hoffmann to Seeman re    |      |      |
| 11 |           | Tetrahedron on Chemistry of          |      |      |
| 12 |           | Nicotine Analogues                   | 9218 | 9218 |
| 13 | PM-000408 | Letter from Hoffmann to Seeman       |      |      |
| 14 |           | thanking him for 6-methylnicotine    |      |      |
| 15 |           | sample                               | 9218 | 9218 |
| 16 | PM-000423 | Memorandum from Weissbecker to       |      |      |
| 17 |           | Wakeham re Low Benzo(a)pyrene        |      |      |
| 18 |           | Delivery Cigarette                   | 9156 | 9156 |
| 19 | PM-000625 | Note from Eichorn to Osdene          |      |      |
| 20 |           | forwarding outline "Biological       |      |      |
| 21 |           | Capability in Chemical & Physical    |      |      |
| 22 |           | Sciences"                            | 9184 | ---- |
| 23 | PM-000663 | Letter from Seeman to Wainer re      |      |      |
| 24 |           | Forwarding samples to FDA            | 9218 | 9218 |
| 25 | PM-000682 | Memorandum from Wakeham to Goldsmith |      |      |
| 26 |           | re "Increased Nitrate Levels in      |      |      |
| 27 |           | Cigarettes"                          | 9161 | 9163 |

28  
0004

1 E X H I B I T S I N D E X

2 ---o0o---

3 Defendant Philip Morris

|   |     |             |      |      |
|---|-----|-------------|------|------|
| 4 | No. | Description | I.D. | I.E. |
|---|-----|-------------|------|------|

5 PM-000865 Safety Assessment of Ingredients

6 Added to Tobacco in the Manufacture

7 of Cigarettes by Doull, John,

8 Frawley, George, Loomis, Squire and

9 Talyor, submitted to

|    |  |                     |      |      |
|----|--|---------------------|------|------|
| 10 |  | Covington & Burling | 9220 | 9221 |
|----|--|---------------------|------|------|

|      |           |                                    |        |      |
|------|-----------|------------------------------------|--------|------|
| 11   | PM-001140 | Weissbecker, Ludwig, Creamer,      |        |      |
| 12   |           | Carpenter: "Cigarette Smoke and    |        |      |
| 13   |           | Tracheal Mucus Transport Rate,"    |        |      |
| 14   |           | American Review of Respiratory     |        |      |
| 15   |           | Disease                            | 9185   | ---- |
| 16   | PM-001217 | Telex from Ulrich to Osdene, re    |        |      |
| 17   |           | Inhalation Study                   | 9210   | 9210 |
| 18   | PM-001219 | Telex from Reininghaus re          |        |      |
| 19   |           | Acute Toxicity Assay               | 9209   | 9209 |
| 20   | PM-001220 | Telex from Kuehl and Ulrich re     |        |      |
| 21   |           | "45 D-Smoke Inhalation Study with  |        |      |
| 22   |           | Male Hamsters, Free Lung Cell      |        |      |
| 23   |           | Assays"                            | 9209   | 9210 |
| 24   |           |                                    |        |      |
| 25   |           |                                    |        |      |
| 26   |           |                                    |        |      |
| 27   |           |                                    |        |      |
| 28   |           |                                    |        |      |
| 0005 |           |                                    |        |      |
| 1    |           | E X H I B I T S I N D E X          |        |      |
| 2    |           | ---                                | o0o--- |      |
| 3    |           | Defendant Philip Morris            |        |      |
| 4    | No.       | Description                        | I.D.   | I.E. |
| 5    | PM-001221 | Telex from Kuehl and Ulrich re     |        |      |
| 6    |           | "24 D-Smoke Inhalation Study on    |        |      |
| 7    |           | Male Rats, with 2R1 and MW         |        |      |
| 8    |           | Cigarettes and Nicotine Vapor      |        |      |
| 9    |           | Added to Non-Tobacco Smoke."       | 9209   | 9210 |
| 10   | PM-001222 | INBIFO Telex re "21-day Inhalation |        |      |
| 11   |           | Study with 2R1 Standard Reference  |        |      |
| 12   |           | Cigarettes and BVW Cigarettes on   |        |      |
| 13   |           | Rats                               | 9209   | 9210 |
| 14   | PM-001223 | Telex from Kuehl, INBIFO, to       |        |      |

|    |   |      |      |
|----|---|------|------|
| 15 | "PM RD RCH" re "23 D-Smoke Inhalation         |      |      |
| 16 | Study on Male Rats with 2R1 Cigarettes        |      |      |
| 17 | And Added Carbon Monoxide or Nitrogen         |      |      |
| 18 | Dioxide"                                      | 9209 | 9210 |
| 19 | PM-001227 Letter from Carpenter to Hackenberg |      |      |
| 20 | re Skin Painting Study                        | 9210 | 9211 |
| 21 | PM-001228 Telex from Carpenter to Reininghaus |      |      |
| 22 | re "Gas Phase Data for X6D90A                 | 9210 | 9211 |
| 23 | PM-001230 Telex from Mull to Osdene           |      |      |
| 24 | re Skin Painting Study                        | 9210 | 9211 |
| 25 | PM-001231 Telex from Osdene to Hackenberg     |      |      |
| 26 | re Skin Painting Study                        | 9210 | 9211 |
| 27 | PM-001232 Telex from Hackenberg to Osdene     |      |      |

28  
0006

1 E X H I B I T S I N D E X

2 ---o0o---

3 Defendant Philip Morris

|    |           |                                  |      |      |
|----|-----------|----------------------------------|------|------|
| 4  | No.       | Description                      | I.D. | I.E. |
| 5  |           | re "Your Telex of March 8, 1977" | 9210 | 9211 |
| 6  | PM-001246 | Telex from Osdene to Hackenberg  | 9210 | 9211 |
| 7  | PM-001274 | Telex from Walk to Osdene        |      |      |
| 8  |           | re recent meeting                | 9210 | 9211 |
| 9  | PM-001279 | Telex from Hackenberg to Whidby  |      |      |
| 10 |           | re NOD Testing                   | 9210 | 9211 |
| 11 | PM-001295 | "Persistent Smoker Advised on    |      |      |
| 12 |           | Hazards", New York Times         | 9187 | ---- |

13 ---o0o---

14

15

16

17

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
0007  
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

(Nothing Omitted)

---o0o---

22

23

24

25

26

27

28

0008

1 (Nothing Omitted)

2 ---o0o---

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

9173

1 TUESDAY, JANUARY 21, 2003

2 (Afternoon Session)

3 ---o0o---

4 The matter of LAURENCE LUCIER and LAURIE LUCIER, et  
5 al, Plaintiffs, versus PHILIP MORRIS INCORPORATED, et al.,  
6 Defendants, Case No. 02AS01909, was continued regularly this  
7 day before the Honorable Steven H. Rodda, Judge of the  
8 Superior Court of the State of California, for the County of  
9 Sacramento, Department 44/1 at 1:45 o'clock p.m.

10 The Plaintiffs, LAURENCE LUCIER and LAURIE LUCIER,  
11 were represented by: GARY M. PAUL, Attorney at Law;  
12 MARY ALEXANDER, Attorney at Law; and ROBERT M. BROWN,  
13 Attorney at Law (not present).

14 The Defendant PHILIP MORRIS INCORPORATED was  
15 represented by: GERALD V. BARRON, Attorney at Law;  
16 STEPHANIE A. SCHRANDT, Attorney at Law; DEBORAH A. SMITH,  
17 Attorney at Law; and ANNIE Y.S. CHUANG, Attorney at Law  
18 (not present).

19 The Defendant R.J. REYNOLDS TOBACCO COMPANY was  
20 represented by: THEODORE M. GROSSMAN, Attorney at Law;  
21 HAROLD K. GORDON, Attorney at Law; ELIZABETH P. KESSLER,  
22 Attorney at Law; DANIEL J. McLOON, Attorney at Law,  
23 and STEVEN N. GEISE, Attorney at Law.

24 The following proceedings were then had:

25 ---o0o---

26 THE COURT: Okay, good afternoon.

27 I know that we've been getting some late starts here.  
28 So apparently it's not some juror's fault, so I'm reluctant



9174

1 to make an issue of it with the jurors yet.

2 Encourage them to be on time, Aaron, but I guess  
3 parking is a problem. They're volunteering their time, so I  
4 don't want to be too harsh with them. But I do recognize  
5 the importance of using our time expeditiously.

6 Bring the jurors in, please.

7 (The jurors are brought in at 1:45 pm.),

8 ---o0o---

9 THE COURT: Good afternoon.

10 (All say "good afternoon".)

11 THE COURT: Mr. Barron.

12 MR. BARRON: Thank you, your Honor.

13 Good afternoon.

14 (All say "good afternoon".)

15 ---o0o---

16 Q. BY MR. BARRON: Good afternoon again, doctor.

17 When we left, we were talking about that timeframe,  
18 that ten-year period from -- roughly ten-year period, from  
19 June of 1966 to 1976, those being Marlboro years for  
20 Mr. Lucier. And we were actually talking about an aspect of  
21 those ten years at Philip Morris dealing with biological  
22 testing, and we were then talking about testing of  
23 cigarettes. In particular, we were talking about reference  
24 cigarettes, standardized cigarettes developed at the  
25 University of Kentucky.

26 Do you remember all that?

27 A. Yes.

28 Q. I want to go to that now, in a little more depth, but  
9175

1 I want to do one thing before I do that.

2 It's pointed out to me that when I was talking about  
3 this Hoffmann/LaRoche -- If I'm pronouncing that

4 correctly -- Philip Morris partner effort, to test  
5 Dr. Dietrich Hoffmann's idea or theory with ascorbic acid, I  
6 maybe should have asked you a couple more questions about  
7 that.

8 A. Okay.

9 Q. First of all, can you briefly describe what ascorbic  
10 acid is?

11 A. Ascorbic acid is vitamin C.

12 Q. Do you recall in theory what the document was that  
13 Dr. Hoffmann had, or would you need to look at the document  
14 again?

15 A. No, I can recall it.

16 The theory was that ascorbic acid, and maybe other  
17 things, like vitamin C and vitamin E, would prevent the  
18 formation of certain toxic compounds.

19 Q. And what was the result of the partnered effort  
20 between Philip Morris and the pharmaceutical company? Did  
21 in fact the theory work or not?

22 A. It did not work.

23 Q. Did it in fact work with vitamin E?

24 A. No.

25 Q. Thank you. That's what I wanted to clear up.

26 So let's go back to what we were talking about, if we  
27 can, right before the noon recess, that is, the Kentucky  
28 Reference cigarette, or cigarettes, because there was more  
9176

1 than one that was developed.

2 And I had placed before you a document that was  
3 Philip Morris Exhibit CS-001068.

4 Is it still up there?

5 A. Yes, sir.

6 (Defendant Philip Morris's Exhibit CS-001068, Pages  
7 28-30 in Proceedings of Tobacco and Health conference,

8 Lexington, Kentucky, February, 1970, was Marked For  
9 Identification.)

10 MR. BARRON: By the way, I just -- Sort of a silly  
11 question. Do we need to do the double zeros and the triple  
12 zeros before the number each time? Does the clerk know?

13 THE CLERK: It's better for the record.

14 MR. BARRON: Okay. I've been forgetting, been trying  
15 to get out of doing it. But I'll do it.

16 Q. All right. So you've got it before you?

17 A. Right.

18 Q. All right. Would you turn to page 28 with me, and I  
19 think I -- I'll try to find my copy, because I was going to  
20 ask you something about that. You don't have my copy -- I  
21 used some yellow highlighting -- Do you?

22 A. Not on page 28, it doesn't have any yellow  
23 highlighting on it.

24 Q. Well, let me try to put it on the Elmo and highlight  
25 it here. While I'm doing that, can you, by looking at the  
26 front of this document, tell the jury what this is?

27 A. The title is Proceedings of the Tobacco and Health  
28 Conference held in Lexington, Kentucky, February 24th and  
9177  
1 25th, 1970. This is Conference Record No. 2.

2 Q. Okay. Let me pull page 28 -- I am going to ask you,  
3 I think three or four quotes from this document.

4 Let me pull on it page 28, it -- Counsel, did you  
5 provide one to Mr. Paul?

6 Do you have any objection to me showing page 28?

7 MR. PAUL: Do I have any objection? No.

8 Do you want the document into evidence?

9 MR. BARRON: Don't make me nervous.

10 MR. PAUL: Do you want the document in evidence?

11 MR. BARRON: Oh, we found mine, okay. Still page 28.

12 MR. PAUL: Mr. Barron, is that the only page that  
13 you're going to move? Or --

14 MR. BARRON: No, I'm not going to move it. I can, if  
15 you want. I was going to ask him a question about it, read  
16 along with me.

17 MR. PAUL: No problem. Okay.

18 MR. BARRON: See if I can do this on this machine.

19 Wrong way.

20 Q. Okay. Reading along on the highlighted there,  
21 "Researchers at the University of Kentucky Tobacco and  
22 Health program, in 1968, recognized the need for a, quote,  
23 'reference standard', close quote, to serve as a basis for  
24 inter- and intra-laboratory comparisons."

25 First of all, do you agree with that thought?

26 A. Yes, definitely.

27 Q. And it may be obvious, but could you explain the  
28 difference between inter- and intra-laboratory?

9178

1 A. Inter- is between laboratories and intra- is within,  
2 the same laboratory.

3 Q. "Scientists in various research laboratories were  
4 using commercial cigarette brands as a source of tobacco  
5 smoke products. The use of different commercial brands or  
6 even the same commercial brand acquired at different times  
7 over a period of time as a source of tobacco smoke products  
8 makes results from different laboratories difficult to  
9 interpret and correlate."

10 Is that another way of saying what you said before  
11 the break?

12 A. Yes.

13 Q. Was Philip Morris one of those companies that, before  
14 this reference cigarette was created, was on some occasions

15 using commercial brands of its own to test?

16 A. It's my understanding they are, yes.

17 Q. Now, I would next like to talk to you about some  
18 things that's on page -- That's on page -- The  
19 acknowledgement page. Let me just find that for you.

20 Same document, your Honor.

21 This is the acknowledgement page for the University  
22 of Kentucky document on this issue? Have you found that?

23 A. Yes, sir, it's page No. 2.

24 Q. And you may look at that or look on the Elmo, as we  
25 call it up here.

26 Was it your understanding that this effort was  
27 supported by the United States through Congress?

28 A. Yes.

9179

1 Q. And, finally, has everybody had a chance? Okay.

2 Finally, I would like to show you page 29 which  
3 actually followed the same paragraph that we were just  
4 showing on page 28, and I've highlighted something up there  
5 that I want you to comment on. It says, "The reference  
6 cigarette is a feasible method of establishing a standard  
7 reference point for biological testing and smoke-chemistry  
8 studies."

9 Would you agree or disagree with that?

10 A. I agree with that.

11 Q. Is the Kentucky Reference cigarette, as a standard,  
12 still around and being used?

13 A. Yes.

14 Q. Is it still around and being used, as far as you  
15 know, by all major U.S. tobacco companies?

16 A. Yes.

17 Q. Do you know of -- Do you know of any significant

18 criticism by the public health community of the use of  
19 Kentucky Reference as reflected in this University of  
20 Kentucky document and as briefly described by you, which  
21 I'll go into more detail?

22 A. No, I don't.

23 Q. We've had some discussions, some reference to a  
24 gentleman's agreement dealing with the issue of testing or  
25 not testing of as-marketed commercial cigarettes. I'm not  
26 going to represent what that testimony was, just indicate  
27 that that subject came up.

28 First of all, after the Kentucky Reference cigarettes  
9180

1 were established and Philip Morris began to use it to do  
2 biological work -- Did Philip Morris continue to do animal  
3 testing?

4 A. Yes.

5 Q. And did it do animal testing in the United States?

6 A. Yes.

7 Q. And did it do animal testing with -- In the United  
8 States with Kentucky Reference cigarettes?

9 A. Yes.

10 Q. For a period of time following the development of the  
11 Kentucky Reference cigarettes, did it no longer continue to  
12 do animal testing of as-marketed or commercial cigarettes?

13 A. That's correct, yes.

14 Q. I'd like to also show you some testimony that the  
15 jury has heard from a witness, not that long ago, on January  
16 9th. And I am going to show you testimony from trial  
17 transcript page 8188, lines six through 14, to ask you a  
18 couple questions, if I might.

19 A. Okay.

20 Q. And I'll just approach the Elmo here. First of  
21 all -- There's the trial transcript. The case and the

22 date.

23 And let me represent to you that the record reflects,  
24 this is testimony given by Dr. Townsend, who testified here  
25 on January 9th. He was asked:

26 "QUESTION: Do you also keep up on your  
27 competition?

28 "ANSWER: We try to.

9181

1 "QUESTION: If I -- If I guess -- What brand  
2 is the" -- Let me reduce this a bit.

3 "What brand is the biggest competition?

4 "ANSWER: The largest brand in the U.S. is  
5 Marlboro.

6 "Have you done biological testing on that?

7 "ANSWER: Yes, some.

8 "QUESTION: Do you find it similar to your own  
9 products in biological testing?

10 "ANSWER: It's very similar."

11 Did there come a time when you, trying to keep track  
12 of what was happening outside of Philip Morris, be it public  
13 or be it competitors -- Did there come a time when you  
14 recognized that R.J. Reynolds had done some biological  
15 testing in the United States of commercial cigarettes,  
16 including Philip Morris's product, Marlboro?

17 A. Yes, I did.

18 Q. How did you come across that information, and when?

19 A. That information was published in the technical  
20 literature, the scientific literature.

21 Q. Do you have any recollection about when that was?  
22 Not holding you down to a precise date.

23 A. I believe it was in the mid-to early '90s. I'm not  
24 sure exactly when. Something like that.

25 Q. Now, did there come a time recently when Philip  
26 Morris decided not just to continue to do the testing, as we  
27 talked about with the reference cigarettes, but also do some  
28 testing, in the United States, of as-marketed or commercial  
9182

1 cigarettes?

2 A. Yes.

3 Q. When did that take place, approximately?

4 A. I believe it was in 1998.

5 Q. And what was the result in terms -- Once it was  
6 tested, in comparison with what the Kentucky Reference ones  
7 or in comparison to what people thought about the cigarette  
8 for its safety?

9 A. There were no surprises; the results were what we  
10 expected. Tar is tar and, depending on the amount of tar  
11 there, gives you the result.

12 Q. Now, why --

13 MR. PAUL: Your Honor, may we approach for just one  
14 second.

15 THE COURT: Yes.

16 (At Bench)

17 ---o0o---

18 MR. PAUL: Again, this is an area of -- I know that  
19 we've been sort of trying the deal with, and that's the  
20 subject of the immunity period.

21 MR. BARREN: It's after immunity.

22 MR. PAUL: I don't think it's after immunity. I  
23 thought it went after '88, or '98 -- If I'm correct.

24 MR. BARRON: I don't think so, because that's not my  
25 memory.

26 MR. GORDON: To be honest, I can't remember. It's a  
27 ten-year period.

28 MR. BARRON: I believe it is January 1, '98 is when



9183

1 immunity begins.

2 MR. PAUL: I just wanted to be sure about the time  
3 period. Thank you.

4 (Back In Open Court)

5 ---o0o---

6 Q. BY MR. BARRON: So let me ask you what I was asking  
7 you about this way.

8 In light of what you said to the jury about the value  
9 in your mind of the development of the reference cigarette  
10 and what it would bring to bear on the issue of testing, in  
11 light of what you said, however, that R.J. Reynolds, besides  
12 that, went ahead and did some testing of commercial  
13 cigarettes, as marked, in essence, not only of theirs, but  
14 even of Marlboros, the competitors, why would it be that  
15 Philip Morris would come along in 1998 and go ahead and  
16 decide to do it on their commercial too?

17 A. I think the reason they did it was because  
18 plaintiff's attorneys were saying that's something that  
19 Philip Morris ought to do, so they went ahead and did it.

20 Q. I think we're all clear, but when you say  
21 "plaintiff's attorneys", you mean people who bring suits  
22 against the companies?

23 A. Yes.

24 Q. And so then when Philip Morris did it, the results  
25 were what you said?

26 A. Right.

27 Q. And as far as you know, are those results available  
28 to be looked at by opposing counsel in cases?

9184

1 A. As far as I know, they are.

2 Q. All righty.

3 I'd like to show you a document that is Philip Morris

4 document zero-zero-zero-six-two-three.

5 -000625. It's actually -- The full title is

6 PM-000623 -- -625?

7 (A brief discussion was held off the record between

8 Mr. Barron and Miss Smith.)

9 (Defendant Philip Morris's Exhibit PM-000625,

10 Handwritten Note from Eichorn to Osdene, "Biological

11 Capability in "Chemical & Physical Sciences", was Marked For

12 Identification.)

13 MR. BARRON: Okay. I've got the wrong one; I'm going

14 to get it right. Three strikes and I'm out.

15 Q. This is Philip Morris Exhibit PM-000625. All right?

16 Okay. Let me show it to you.

17 Take a look at it, and when you're ready, just tell

18 me in your own words what it is. Identify it, if you can.

19 A. This appears to me it's a presentation, perhaps, on

20 the need for biological testing program.

21 Q. And whose document is it? If you can tell?

22 A. It's from a Dr. Paul Eichorn to Dr. Osdene.

23 Q. Do you know him?

24 A. Yes. I know both these people.

25 Q. Would you turn to page ten. And is there a

26 recommendation of aggressive in-house program for animal

27 facilities?

28 A. Yes, there is.

9185

1 Q. What does "in-house program" mean? What jargon is

2 that?

3 A. I think it's a laboratory that Philip Morris has --

4 Owns -- Uses.

5 Q. Would you take a look at page 14.

6 A. Okay.

7 Q. And is there any recommendation concerning an

8 acquisition of an independent biological research facility  
9 and testing facility?

10 A. Yes, there is.

11 Q. And what does that mean?

12 A. Go buy a laboratory that's already in existence, I  
13 suppose.

14 MR. BARRON: Thank you.

15 I'll get this off. Let me also show you, concerning  
16 the question of Philip Morris and biological testing --  
17 It's exhibit number PM-001140.

18 (Defendant Philip Morris's Exhibit PM-001140,  
19 Weissbecker, Ludwig, et al, "Cigarette Smoke and Tracheal  
20 Mucus Transport Rate: Isolation of Effect of Components of  
21 Smoke" was Marked For Identification.)

22 Q. BY MR. BARRON: Would you again look at that. And,  
23 when you're ready, would you explain, or identify what it  
24 is.

25 A. This is a copy of a publication in the American Review  
26 of Respiratory Disease from 1971 by three authors from  
27 Philip Morris, with a title, "Cigarette Smoke and Tracheal  
28 Mucus Transport Rate."  
9186

1 Q. Do you know who these gentlemen were?

2 A. Yes. They're researchers at Philip Morris, or they  
3 were researchers at Philip Morris.

4 Q. And they were publishing the results of some  
5 biological testing with cigarette smoke?

6 A. That is correct, yes.

7 Q. And does it in fact show some changes?

8 A. Yes.

9 Q. So it was showing in effect that it was having an  
10 effect on some people's -- Not some people's -- But having

11 an effect on -- What's the right word?

12 A. An animal.

13 Q. -- An animal's anatomy or system?

14 A. Yes.

15 Q. And would you look at page 186 of the article.

16 A. Right.

17 Q. This is taken from an old journal, obviously.

18 And do you see under the heading "Acknowledgement"?

19 A. I'm sorry; I was on the wrong page.

20 Q. That's okay. Page 186. I'll just put it up on the

21 screen.

22 A. I see it. Yes.

23 MR. PAUL: Your Honor, I would rather that exhibits

24 were moved into evidence, as opposed to --

25 MR. BARRON: I'm sorry; let me just ask this to speed

26 up the process.

27 Q. When Philip Morris was doing this work, were they

28 doing work with the help of any outside laboratory or people

9187

1 so that, in effect, what they were doing was public before

2 they were even published?

3 A. They were working with outside companies, yes.

4 Q. Who were they working with?

5 A. Allied Chemical Corporation.

6 Q. Anything else? (sic)

7 A. Food and Drug Research Laboratory.

8 Q. Okay. Thank you.

9 Okay. Now, we're still talking about this ten-year

10 period.

11 What I would like to know is: Were there any changes

12 to the Philip Morris product, in particular Marlboro, during

13 this period? And let me ask you straight out: During this

14 period, did Philip Morris produce a Marlboro Light?

15 A. Yes, I believe they did.

16 Q. And the date I have is 1972. Does that sound about  
17 right?

18 A. That sounds about right, when I went there, yeah.

19 Q. Now, in addition to that, was, in your mind, the  
20 public health community saying anything about whether it was  
21 a good or a bad idea to produce such things as lights?

22 A. They were saying, constantly saying, to reduce the  
23 tar and nicotine, to bring the tar and nicotine down.

24 (Defendant Philip Morris's Exhibit PM-001295,  
25 "Persistent Smoker Advised on Hazards," New York Times, was  
26 Marked For Identification.)

27 Q. BY MR. BARRON: Let me show you, if I could, Philip  
28 Morris's Exhibit -001295, and, as I do that, ask you was  
9188

1 Philip Morris during this time period --

2 A. Yeah.

3 Q. -- And, of course, you were there during this time  
4 period now, at least from '72 -- For people to look outside  
5 the company to see what people were saying, public and  
6 private health officials?

7 A. Yes, we were.

8 Q. Okay, let me -- Double-zero-1295.

9 Is this a clipping from the New York Times, the  
10 newspaper?

11 A. Yes.

12 Q. Turn to the last page and assume that page 37 is a  
13 blowup of what's reported.

14 A. Okay.

15 Q. Did you become aware that the United States Public  
16 Health Service, on behalf of it National Clearinghouse for  
17 Smoke and Health was recommending to members of the public

18 such things as, number one, choose a cigarette with less tar  
19 and nicotine?

20 A. Yes.

21 Q. No. 2, don't smoke your cigarette all the way down?

22 A. Yes.

23 Q. No. 3, take fewer draws on each cigarette?

24 A. Yes.

25 Q. No. 4, reduce your inhaling?

26 A. Right.

27 Q. No. 5, smoke fewer cigarettes each day?

28 A. Right.

9189

1 Q. And the date of that is --

2 A. The date is September the 17th, 1968.

3 Q. Okay. I guess I would go next to asking you about  
4 what else is going on in terms of developing things at  
5 Philip Morris besides coming out with a light or lower-tar  
6 Marlboro.

7 You mentioned that Merits came out in 1976, the end  
8 of this ten-year timeframe we're talking about. How long  
9 did it take for Merits to get developed? In other words,  
10 how long was that project?

11 A. It was several years in duration. I don't know  
12 exactly when it started, but it was not something that was  
13 done very quickly.

14 Q. Why don't you tell us in a way that would make sense  
15 to you, first of all, why the Merit program was undertaken.  
16 What were -- What was the purpose? What was trying to be  
17 accomplished?

18 A. Right.

19 What had happened in the mid-'70s or the early '70s  
20 was that the companies, Philip Morris and others, were  
21 offering low-tar cigarettes to the consumer. But the

22 consumer wasn't buying those, and the tar and nicotine  
23 reductions in those very low-tar cigarettes were not  
24 acceptable to the consumer.

25           So Philip Morris set up a program and put some people  
26 working on the program, and a person by the name of Bob  
27 Ikeda had an idea that using a technique called a gas  
28 chromatograph. We talked about that before.

9190

1           A gas chromatograph is an instrument that can  
2 separate one compound from another, from a complex mixture.

3           He had the idea that if he took smoke and put that  
4 through a gas chromatograph -- And on the outlets of the  
5 gas chromatograph, he would build a sniffing port, he called  
6 it. He could smell the compounds that were separated  
7 individually from the smoke and identify which ones had the  
8 best aroma, the one that had the best potential for flavor,  
9 to go back into the tobacco, to give to the smoker when they  
10 smoke it.

11           So after a long time of trial and error in using that  
12 instrument, he was able to identify a number of flavor  
13 constituents and flavor compounds that were grouped  
14 together, put back in the tobacco, and then put into the  
15 Merit cigarette.

16           So that really is the essence of the Merit cigarette.  
17 It was the first low tar cigarette that had a real good  
18 taste. And that was the one that was put on the market and  
19 one that I switched to when it was available.

20           And it did have good taste.

21           During -- Anything else that -- Was that clear?

22 Q.       Yeah. Let me -- Let me ask you this.

23           What was the reaction, as you understood it, from  
24 some of the public health people to that?

25 A. It was very, very good reaction. We were very happy,  
26 very proud of the fact that the public health community was  
27 saying that this is a major advance. It was something that  
28 that they thought we had done very good with. And we were  
9191  
1 all elated about it.

2 (Defendant Philip Morris's Exhibit CS-001093,  
3 Testimony of Bross before the House of Representatives  
4 Intergovernmental Relations and Human Resources Subcommittee  
5 of the Committee on Government Operation, was Marked For  
6 Identification.)

7 Q. BY MR. BARRON: Let me show you an exhibit, a Philip  
8 Morris Exhibit, CS-001093.

9 I'd like you to turn, first of all, to the first  
10 page; to a copy of hearings before the Subcommittee on  
11 Government Operations, House of Representatives, 95th  
12 Congress.

13 MR. PAUL: Your Honor, I'm sorry to interrupt.

14 THE COURT: Approach the bench, please.

15 (At Bench)

16 ---o0o---

17 MR. PAUL: I think we're running into a Noerr- Pennin  
18 gton issue here. This is testimony in front of Congress.

19 MR. BARRON: This is not the testimony --

20 MR. PAUL: I know. Doesn't matter whose testimony it  
21 is.

22 THE COURT: Which testimony is it?

23 MR. BARRON: This is a comment by -- (pausing) --

24 Owen J. Bross, the director biostatistics, Rosswell Park  
25 Memorial Institute. It's a Public Health Service person's  
26 comments on the safety or the advancement of Merit. Has  
27 nothing to do with our rights and the First Amendment,  
28 the --



1 MR. PAUL: It's being put forth for the purposes of  
2 advancing the issues that you just raised with this witness,  
3 the fact that there was a positive step in putting out a  
4 Merit cigarette.

5 MR. BARRON: Right.

6 MR. PAUL: And it seems to me that, under the case  
7 law that we've been operating in this case, that violates No  
8 err-Pennington. This is direct testimony.

9 MR. BARRON: No. What it is is, what it is is, is  
10 that it is going to the issue of notice, which -- matters  
11 stated -- but notice as to what Philip Morris was aware of,  
12 what people were saying.

13 THE COURT: What are your thoughts on this,  
14 Mr. Gordon?

15 MR. GORDON: I think that when we have raised the  
16 issue of Noerr-Pennington on prior occasions, it's been  
17 testimony that Congress, through a tobacco-company  
18 representative or a tobacco institute about warnings and  
19 whether they should be on packs -- I think this is a  
20 separate category here. And does not fall into the prior  
21 colloquies we've had, which have all been about warnings and  
22 whether they should be on packets and statements either  
23 directly by a tobacco company or by, like, your Exhibit 31,  
24 which I jumped up and down about, of a Tobacco Institute  
25 speaking on behalf of the tobacco industry.

26 So I think that's distinctive here.

27 THE COURT: Are the parties here involved in that  
28 proceeding, or is that something that's completely

1 independent?

2 MR. BARRON: No. I'd have to check. I'm not aware  
3 that they are, but I'll represent to the Court, whether they

4 were involved or -- What was going on here, I just don't  
5 know the answer.

6 MR. PAUL: I was trying to clarify the issues. I  
7 thought it was wider than warnings, I thought it was  
8 lobbying activity in front of Congress.

9 MR. BARRON: Right, it is. But this is not lobbying;  
10 this is something that has a hearing on it.

11 Go ahead; I'm sorry.

12 THE COURT: But what?

13 MR. BARRON: I'll let you rule.

14 THE COURT: All right. I think this is outside the  
15 concerns of Noerr-Pennington, so I am going to overrule the  
16 objection.

17 Go ahead.

18 MR. PAUL: Okay.

19 (Back In Open Court)

20 ---o0o---

21 Q. BY MR. BARRON: Looking at page 98, is this a  
22 commencement of a statement by someone?

23 A. Toward the bottom of the page?

24 Q. Yes, sir.

25 A. It appears so, yes.

26 Q. And is the statement by whom?

27 A. Irwin, D.J. Brothers, Ph.D., Director of  
28 Biostatistics, Roswell Park Memorial Institute.  
9194

1 Q. You said that pretty fast. Director of what?

2 A. Sorry about that.

3 Q. It's all right.

4 A. Biostatistics, Roswell Park, Memorial Institute.

5 Q. And we've already heard about Roswell Park, and I am  
6 not going to go into detail there.

7 But would you turn to page 103 of the statement by

8 him.

9 A. Okay.

10 Q. And I am going to ask you if this is the kind of  
11 thing that Philip Morris was on notice about, concerning  
12 whether it was doing the right thing or not with the Merit?

13 A. Correct, yes.

14 Q. May I show this now, your Honor, the statement?

15 THE COURT: You're offering this?

16 MR. BARRON: I can offer him the whole document or  
17 just ask him a question for notice.

18 THE COURT: Mr. Paul?

19 MR. PAUL: Well, if he's going to show it, I would  
20 rather that he offer the document.

21 THE COURT: Your pleasure, Mr. Barron.

22 MR. BARRON: I will offer the document.

23 THE COURT: Any objection?

24 MR. PAUL: No, your Honor.

25 THE COURT: Okay, it's received.

26 MR. BARRON: So that is CS-001093 of which we're  
27 speaking.

28 (Defendant Philip Morris's Exhibit CS-001093,  
9195  
1 previously Marked for Identification, was received In  
2 Evidence.)

3 Q. BY MR. BARRON: "The sad truth is that the chemist  
4 who developed the taste process for Merit cigarettes has  
5 done more for public health in the past year than the  
6 N.C.I." -- That's the National Cancer Institute?

7 A. Yes, sir.

8 Q. -- "And the A.C.S." -- That's the American Cancer  
9 institute?

10 A. Correct.

11 Q. -- "Combined have done in the last ten years"?  
12 A. Correct.  
13 Q. That's obviously quite complimentary. I'm not asking  
14 whether that's true or not, but is that the kind of thing  
15 that Philip Morris was hearing at the time?  
16 A. Yes. Yes, we were.  
17 (Defendant Philip Morris's Exhibit CS-001095, NCI,  
18 "Smoking & Health: A program to Reduce the Risk of Disease  
19 in Smokers", was Marked For Identification.)  
20 Q. MR. BARRON: Let me show you another document,  
21 CS-001095. And go with me, it indicates -- Is this on the  
22 first page a status report dated December, 1977, from the  
23 National Cancer Institute?  
24 A. Yes, sir, it is.  
25 Q. The National Heart, Lung and Blood Institute?  
26 A. Right.  
27 Q. The National Institute of Health?  
28 A. Right.  
9196  
1 Q. And would you turn, please, if you would, to page  
2 Roman numeral X or ten.  
3 A. Okay.  
4 MR. PAUL: I'm sorry; I missed the page number.  
5 MR. BARRON: Roman numeral X.  
6 MR. PAUL: Thank you.  
7 Q. BY MR. BARRON: I'd like to display that -- Well, it  
8 will take too much time to go through that.  
9 Do you see there that the report is commenting on  
10 factors that are found to contribute most significantly to  
11 the less-hazardous cigarettes?  
12 A. Yes, I do.  
13 Q. And on that list is, quote, "the use of flavor  
14 additives" --

15 A. Yes.

16 Q. -- To restore receptibility?

17 A. Yes.

18 Q. Again was that the sort of thing that Philip Morris  
19 was hearing at the time?

20 A. Yes.

21 (Defendant Philip Morris's Exhibit CS-001092,  
22 Rehabilitation, 32: 41-42, "Smoking and Society", was Marked  
23 For Identification.)

24 Q. BY MR. BARRON: Finally, on that issue, Philip Morris  
25 Exhibit CS-001092.

26 Is this an -- Turn to page two -- Is this an  
27 excerpt from a European meeting?

28 A. Yes, sir.

9197

1 Q. Now, if you turn to the next page in sequence, it's  
2 41 of the meeting --

3 A. Right.

4 Q. -- Do you see some statements by an M.A.H. Russell?  
5 Down near the bottom?

6 A. I see that, yes.

7 Q. The jury has heard about him also, Dr. Russell.

8 Would you turn to the next page, page 42 --

9 A. Okay.

10 Q. -- And I want to read to you -- Determine of  
11 notice, what Philip Morris was understanding what people in  
12 the public were saying about their efforts or these kinds of  
13 efforts. I want to read to you the following.

14 MR. PAUL: Your Honor, unless he's going to move it  
15 into evidence, I object to the reading.

16 MR. BARRON: I move it into evidence. I have no  
17 objection; I was trying to save time.

18 THE COURT: Is there any objection to receiving it?

19 MR. PAUL: No, not at all.

20 THE COURT: It's received.

21 (Defendant Philip Morris's Exhibit CS-001092,  
22 previously Marked for Identification, was received In  
23 Evidence.)

24 MR. BARRON: Okay. Let me put it on the screen then.  
25 It's pretty small.

26 We're out of focus. Is there an auto focus on this?  
27 I just want to make it clearer, yeah. Let me just stand  
28 here. I think we can read it.

9198

1 Q. At the risk of being hounded out of the  
2 conference -- There was a meeting of health people; was  
3 there not? (Reading)

4 A. Yes.

5 Q. -- I am going to suggest that over the past 20 years  
6 the tobacco industry may have achieved more in reducing  
7 smoking-related diseases than we have. This is because they  
8 have focused their efforts on making cigarettes safer.  
9 There have been three very important changes in the design  
10 of cigarettes. (Reading)

11 And then he goes through it:

12 Switch to filters.

13 Reconstituted tobacco.

14 Ventilated filters, the things that you've talked  
15 about, haven't you? (Reading)

16 A. Yes.

17 Q. And then down at the bottom: A better approach may  
18 be to develop low-tar, medium-nicotine cigarettes. Such  
19 cigarettes would enable smokers to have the health advantage  
20 of a very much lower tar and C.O. intake, but there would be  
21 sufficient nicotine to provide satisfaction and maintain

22 acceptability.

23           There is not much sense in a safer cigarette which no  
24 one will smoke. (Reading)

25           Do you agree that last comment?

26 A.       I certainly do, yes.

27 Q.       In dealing with lung cancer and coronary heart  
28 disease, it is going to be more effective to --  
9199

1 A.       Operate.

2 Q.       -- Operate on the cigarette than on the patient.

3 Just as it is far easier to change the cigarette than the  
4 lifelong habits of smokers. (Reading)

5           Do you agree with that?

6 A.       Yes.

7 Q.       Again, is this the kind of thing that Philip Morris  
8 was given notice of as they were doing this Merit program?  
9 And following it?

10 A.       Right.

11           THE COURT: We'll take a ten-minute recess; please  
12 don't discuss the case.

13           (A ten-minute recess was taken at 2:30 pm.)

14                               ---o0o---

15           THE COURT: Okay, Mr. Barron.

16           MR. BARRON: Thank you, your Honor.

17           MR. GROSSMAN: We're missing one, your Honor.

18           THE COURT: Oh, I'm sorry. Thank you.

19                               ---o0o---

20           THE COURT: Okay, Mr. Barron.

21           MR. BARRON: Thank you, your Honor.

22 Q.       You may have answered this, but I'm not sure, so let  
23 me just ask it.

24           Besides the fact that you switched to Merit, and you

25 know Mr. Lucier did, do you have any knowledge about whether  
26 it was found to be consumer acceptable by people?

27 A. I think it was found to be consumer acceptable by the  
28 large number of people, yes.

9200

1 Q. Now, in light of what we talked about over the years,  
2 going up to, now, 1976, I want to show you some trial  
3 transcript again and ask you a question about it. It's from  
4 November 20, 2002, and it -- It mentions on page 3995, line  
5 19, and goes over to what I am going to ask you about on  
6 3998, line eight.

7 I'm not going to read all pages, but just to get us  
8 oriented, I want to represent to you that there was  
9 testimony by the former employee, Dr. William Farone.

10 A. Okay.

11 Q. And I will put this on the Elmo, with your  
12 permission, to show what I am going to start with, to orient  
13 us.

14 These are questions by Miss Alexander, plaintiffs  
15 counsel:

16 "QUESTION: I would like to show you what  
17 has been received into evidence as Exhibit 2, and  
18 ask you if" -- And I interrupt in here.

19 "But let me just make sure that we're all  
20 oriented. Exhibit 2 we just looked at earlier  
21 with you, and that was Dr. Wakeham's 1961 report.  
22 You can -- If you still have it there."

23 Let me approach the witness and speed this up.

24 A. Okay.

25 MR. BARRON: I'll put it on the chart, the Elmo, for  
26 you.

27 Exhibit 2 was the 1961 report by Dr. Wakeham, the one  
28 that we talked about on page nine, had the carcinogens



9201

1 possible carcinogens. We talked about that.

2 And now I want to go to what Dr. Farone said and ask  
3 you something about it, if I might.

4 So certain passages were being asked about by Miss  
5 Alexander, we come over to page 3998, top right-hand corner.

6 And, these lines are what I'm particularly focusing  
7 on now:

8 "And what was your understanding of the reduction of  
9 carcinogens in smoke? In this section that says, to achieve  
10 this objective will require a major research effort?

11 "Do you agree with that?

12 "ANSWER: Yes."

13 And remember, this was given in 1961 -- Talking  
14 about Exhibit 2, Dr. Wakeham's statement, obviously.

15 And I'm going -- I'm talking to him about it in  
16 1976.

17 And now orienting you, which is when Dr. Farone said  
18 it was the first year at Philip Morris.

19 "QUESTION: What did Dr. Wakeham say to you about it?

20 "ANSWER: Well, that's one of the reasons they hired  
21 me is -- 15 years had gone by, and no significant  
22 reductions had been made, really."

23 15 years being from 1961 to 1976.

24 So the question was: "Can you help us figure out a  
25 way to reduce these things?"

26 Q. Do you agree with Dr. Farone's comments that in those  
27 15 years, from 1961 to 1976, when Merit came out, there had  
28 been what he said, there was no significant reduction over  
9202

1 15 years?

2 A. No, I certainly don't agree with that.

3 Q. Let's go to the years that came then, 1976, which was

4 coincidentally not only the time in which Mr. Lucier  
5 switched to Merit -- Apparently you did?

6 A. Right.

7 Q. -- But also the year that Dr. Farone arrived?

8 A. Right.

9 Q. And I want to talk about those years then, '76  
10 forward, and then in particular some of those years that  
11 Dr. Farone comments on when he was there from 1976 to 1984.  
12 All right?

13 A. Okay.

14 Q. First of all, to orient you again, I want to say a  
15 couple things and then go to some testimony that was given.

16 First of all, first assume that Mr. Lucier testified  
17 that neither Philip Morris nor R.J. Reynolds never informed  
18 him or the public, as far as he was aware, that filtered  
19 cigarettes were safer than unfiltered cigarettes.

20 Second, I want you to assume that he's testified that  
21 neither Philip Morris nor R.J. Reynolds ever suggested that  
22 unfiltered cigarettes cause lung cancer, cancer, but  
23 filtered cigarettes did not. He never said that Philip  
24 Morris or Reynolds ever said anything like that.

25 Second, I want you to assume that Mr. Lucier said  
26 about switching to Merits that he does not recall having any  
27 statement made by anyone affiliated with Philip Morris to  
28 the effect that low-tar and low-nicotine cigarettes are  
9203

1 easier to quit than other kinds of cigarettes. All right?

2 A. Right.

3 Q. Third, I want you to assume that Mr. Lucier has  
4 testified that he in fact did not switch to the low-tar  
5 Merits for the purpose of trying to quit -- But rather  
6 based on low tar and good taste.

7 By the way, that is what Philip Morris thought they

8 had achieved with Merit, correct?

9 A. That is correct, yes.

10 Q. And that he further said that his decision to switch  
11 was based on lower tar and good taste.

12 Now, why did you switch to Merits?

13 A. Lower tar and good taste.

14 Q. Okay. By the way, did you have family members who  
15 smoked that you gave some recommendation about, as to -- To  
16 switch or not switch?

17 A. Yes.

18 Q. Was that your mother?

19 A. It was my mother.

20 Q. And did you tell her to switch to Merit, if she was  
21 going to smoke?

22 A. She was smoking Benson & Hedges at the time, and I  
23 gave her some Merit. She tried them; she liked them; she  
24 switched.

25 Q. All right, by the way --

26 A. Excuse me. On the other hand, I gave some to my  
27 father, and he didn't switch. He didn't like them that  
28 much.

9204

1 Q. Fair enough. That gets to the idea --

2 A. Some people --

3 Q. Some people's tastes are different than other people?

4 A. Right.

5 Q. By the way, you talked about the flavors. In order  
6 to achieve the lower-tar part of the Merit, would one need  
7 to leave the product as designed and not tear the filter  
8 off?

9 A. Yes.

10 Q. By the way, there was some mention that there was a

11 gentleman at Philip Morris, Mr. Leo Meyer, I think; is that  
12 right?

13 A. Leo Meyer, yes.

14 Q. And some comment by Dr. Farone that Leo Meyer  
15 occasionally tore filters off cigarettes, including Merits.

16 Do you have any understanding as to why he did that?

17 A. Mr. Meyer was director of development, product  
18 development at one time. And the reason he would tear the  
19 filters off some of the cigarettes was, he said, to be able  
20 to get a better taste of the tobacco, because he was  
21 responsible for -- Or his people were -- For putting the  
22 blend together, so he wanted to taste the tobacco better.

23 That's what he said.

24 Q. All right. Let's talk about Dr. Farone for just a  
25 moment. While he was there, you were there, correct?

26 A. Yes.

27 Q. The entire time -- Because you had arrived in '72?

28 A. I was there the entire time.

9205

1 Q. And you were there when he left in '84?

2 A. Correct.

3 Q. During those eight years, did it appear to you as if  
4 others had acted as if Dr. Farone was a friend?

5 A. Yes.

6 Q. Did it appear to you that he acted as if he  
7 considered some of the people that he worked with as  
8 friends?

9 A. Yes.

10 Q. Did that hold true of you?

11 A. Yes.

12 Q. Did you ever hear of any kind of policy or any other  
13 kind of suggestions that people at Philip Morris who were in  
14 that type of leadership position were not supposed to

15 develop any kind of friendships or social rapport with  
16 others?

17 A. No. I -- I myself, he did too, developed  
18 friendships with people up and down the ladder -- From  
19 technicians to the highest-level scientists.

20 Q. Would there be occasions where scientists would get  
21 together and disagree?

22 A. Lots of times.

23 Q. Was it allowed to disagree?

24 A. Yes.

25 Q. Was it allowed to -- Was it allowed to criticize,  
26 adversely criticize, uncomplimentary -- in other words, not  
27 to sort of be mean about it -- but to criticize a line of  
28 thought or a line of science that somebody was going down?  
9206

1 A. Absolutely. That's sort of the scientific process,  
2 among scientists. Some people would call it arguing; we  
3 call it heated discussions about work that was going on.

4 Q. Was there any rule that one could never say anything  
5 that was uncomplimentary about the company?

6 A. No.

7 Q. Now, let me talk to you about a few things.

8 By the way, can you give us an idea of how many times  
9 you'd had conversations with Dr. Farone, over the years that  
10 he was there, the eight years?

11 A. I don't know. We very frequently, almost every day,  
12 met for conversation in the mornings, 6:30, 7:00 o'clock,  
13 sort of an informal discussion, a scientific discussion  
14 generally about things that were going on in the  
15 laboratories. And then we would have formal meetings  
16 with -- With him and others. We would have seminars,  
17 hundreds, if not thousands, of meetings -- Almost every

18 day.

19 Q. All right. INBIFO, I-N-B-I-F-O, what's that?

20 A. That's a laboratory in Germany, Cologne, Germany,  
21 that does biological testing for Philip Morris. It's owned  
22 by Philip Morris.

23 Q. While you were there and Dr. Farone was there, did  
24 you ever hear Dr. Farone criticize the relationship that  
25 Philip Morris had with that laboratory, its decision to use  
26 it, its decision to use it in any particular way, its  
27 decision about documents or anything?

28 A. No, sir, I did not.

9207

1 Q. Now, we've had testimony in this trial from  
2 Dr. Farone on November 21st, 2002, that he, Dr. Farone, had  
3 while he was there at Philip Morris, had access to lots of  
4 INBIFO documents.

5 Did you have access to INBIFO documents?

6 A. Yes, I did.

7 Q. Do you know of others who had access to INBIFO  
8 documents?

9 A. Yes.

10 Q. Give us an example.

11 A. Jim Charles, Bob Pages, Ray -- Mr. Carpenter -- I  
12 can't think of his first name right now. Lots of people  
13 had. Everybody that needed them.

14 Bob Carpenter. I'm sorry.

15 Q. Have you seen INBIFO documents still existing today?

16 A. Yes.

17 Q. Dr. Farone mentioned that he -- I don't mean to give  
18 you -- I don't mean for you to try to count them up or give  
19 us an exact estimate -- But he testified that he thought  
20 there were approximately 206,000 on the website reachable by  
21 Internet. Do you know if there are substantial numbers of

22 documents on the Internet available through INBIFO?

23 A. There are substantial, but I don't know what the  
24 number is.

25 MR. BARRON: Now, let me show you, if I could,  
26 Exhibit Number -- Plaintiff's Exhibit No. 1717. I'm not  
27 sure whether it's been admitted or not. Let me show it to  
28 you.  
9208

1 Let me also show you actually, this next one that may  
2 relate to it or may not. I want you to tell me, which is  
3 Exhibit NO. CS-001079.

4 (Defendant Philip Morris's Exhibit CS-001079, Report,  
5 Skin-Painting Study on Whole Smoke Condensates from Test  
6 Cigarettes was Marked For Identification.)

7 Q. BY MR. BARRON: Now are let me quickly orient you  
8 here, the Plaintiff's Exhibit, the first one, was I believe  
9 something that was shown and discussed by Dr. Farone.

10 The second one is another document, and ask you first  
11 of all, looking at the report numbers and what they deal  
12 with, are they related in some way?

13 A. They have the same report number on them, so they're  
14 probably related and they have -- Some, if not all, the  
15 same test cigarettes.

16 Q. In your own words, just would you tell us all what  
17 these are.

18 A. These are typical INBIFO reports that were written on  
19 the results of -- They obtained in this case on whole-smoke  
20 condensates, the mouse skin-painting, from these -- From  
21 these test cigarettes and reference cigarette.

22 Q. In combination, is there anything missing from those  
23 reports that you know about?

24 A. Not that I know of.

25 Q. Now, are these the only parts that Dr. Farone talked  
26 about in the ones that I just entered -- Are these the only  
27 INBIFO reports that exist on these reports and biological  
28 testing?

9209

1 A. No, sir. There are thousands of them.

2 Q. I would move into evidence, your Honor, our document  
3 -001079?

4 MR. PAUL: No objection.

5 THE COURT: Received.

6 MR. GORDON: Limiting instruction?

7 THE COURT: Limited to Philip Morris.

8 MR. GORDON: Thank you, Judge.

9 (Defendant Philip Morris's Exhibit CS-001079,  
10 previously Marked for Identification, was received In  
11 Evidence.)

12 MR. BARRON: Excuse me, your Honor.

13 MR. PAUL: Do you want some water?

14 MR. BARRON: That's the problem. Don't have it go  
15 down the wrong pipe, and how to embarrass yourself is major  
16 problem, in front of a lot of people all the same time.

17 THE WITNESS: I'm not making fun of you; we've all  
18 been there.

19 (Defendant Philip Morris's Exhibits PM-001219,  
20 -001220, -001221, -001222, -001223, INBIFO Documents, were  
21 Marked For Identification.)

22 MR. BARRON: No, go ahead; I deserve it.

23 Q. What I've put before you is a number of documents,  
24 and I'll read off the numbers: They are, in sequence,  
25 Philip Morris, PM-001219.

26 They're all two zeros in front of it.

27 A. Um-hum.

28 Q. -1220, -1221, -1222, and -1223.



9210

1 So I can stop talking, tell us what they are.

2 A. These are all INBIFO documents that are typical of  
3 the documents that are kept by INBIFO, on the experiments  
4 that are done there.

5 Q. There are more than this available on the P.M.  
6 website and on the Internet?

7 A. Yes, sir, there are.

8 Q. These are just examples?

9 A. These are just examples, that's right.

10 MR. BARRON: I move them all into evidence, your  
11 Honor.

12 MR. PAUL: Okay. I haven't had a chance to read them  
13 all, but I'm sure they're fine.

14 MR. BARRON: They're --

15 MR. PAUL: No.

16 THE COURT: Received.

17 MR. GORDON: Limiting instruction.

18 THE COURT: Limited to Philip Morris.

19 MR. GORDON: Thank you, your Honor.

20 (Defendant Philip Morris's Exhibits PM-001219,  
21 -001220, -001221, -00122, -001223, previously Marked for  
22 Identification, were received In Evidence.)

23 Q. BY MR. BARRON: Let's do this. Let me show you  
24 another set, and I'll read it. I am going to show you  
25 Philip Morris numbers -- And these are not in sequence --  
26 PM-00 -- They all have the 0-0 number -- -1217, -1228.  
27 -1227, -1230, -1231, -1232, -1246, and -1274. And -1279.

28 And would you look at these, please, and tell us what  
9211

1 they are.

2 A. Yes. These are all also INBIFO documents, typical  
3 INBIFO documents, documents that either were sent to

4 Richmond or generated from Richmond to INBIFO.

5 Q. That's the point. These are documents that  
6 demonstrate that there were communications from INBIFO in  
7 Germany to Philip Morris in the United States at Richmond?

8 A. Right.

9 Q. And the other way?

10 A. That's correct, yes.

11 MR. BARRON: I would move these into evidence, your  
12 Honor.

13 THE COURT: Okay?

14 MR. PAUL: No objection. No objection.

15 THE COURT: Received.

16 MR. GORDON: Limiting instruction, please.

17 THE COURT: Limited as to Philip Morris.

18 MR. GORDON: Thank you, Judge.

19 (Defendant Philip Morris's Exhibits PM-001217,  
20 -001227, -001228, -001230, -001231, -001232, -001246,  
21 -001274, -001279, INBIFO Documents, were Marked For  
22 Identification and were received In Evidence.)

23 Q. BY MR. BARRON: Now, are these the only ones that  
24 might exist out of the 206,000, or whatever it might be, on  
25 the Internet or on the website?

26 A. No, sir.

27 Q. The jury has heard testimony about Dr. Osdene, and  
28 they've seen Dr. Osdene's handwritten note. Don't want me  
9212

1 to quote it, but they've heard testimony about it's safe,  
2 and testimony about a handwritten note and seen a  
3 handwritten note about acting on things, and destroying  
4 handwritten documents.

5 They're heard, or seen, rather, something about a  
6 note concerning a dummy mailing address, shipped documents  
7 to Cologne. First of all, did you know about anything such

8 a thing if it was occurring at the time?

9 A. Did not, no.

10 Q. Do you know of any such activities that have in fact

11 resulted in the destruction of the original INBIFO

12 documents?

13 A. I do not, no. Or any other document.

14 Q. Is INBIFO a certified laboratory?

15 A. Yes, it is.

16 Q. Does it follow the certified laboratory practice?

17 A. Yes. It is, it's a G.L.P. laboratory practice.

18 Q. What does that mean?

19 A. Good Laboratory Practice.

20 Q. Which means that they have to keep track of their

21 research books and experimental books by page numbers?

22 A. They have to keep track of everything.

23 Q. They have to log it?

24 A. Everything, right.

25 Q. Can they get occasionally inspected?

26 A. They do get inspected, yes.

27 Q. And does anybody demonstrate that they're missing lab

28 books?

9213

1 A. No, sir.

2 Q. All right. I want to talk about another subject,

3 nicotine and the nicotine analogue program that you

4 mentioned that somewhat earlier?

5 A. Okay.

6 Q. First of all, I want to read to you something that --

7 Dr. Uydess testified about, not live, U-Y-D-E-S-S, not live,

8 but Dr. Uydess testified about through reading of

9 transcript, rather than testifying live?

10 A. Okay.

11 Q. It comes from page of the trial here -- First of  
12 all, January 6th, 2003, and it's on pages 7614 and 7615.

13 And to shorten it up, I'll give you the exact cite.  
14 It's page 26 on -- I'm sorry. Page 7614, line 26, to page  
15 7615 line 17.

16 In essence -- Let me have you assume that he  
17 indicated that there was something that he had seen or heard  
18 about some question people had about spiking of nicotine out  
19 of a bottle in cigarettes, Philip Morris or something. He  
20 indicated that Philip Morris never did spike, never would  
21 spike; it wasn't that kind of a company.

22 A. Okay.

23 Q. Is that true?

24 A. That is very true, yes.

25 Q. Now, let's talk about the nicotine analogue program.  
26 Would you put in your own words why we heard about the  
27 desire already, from a health standpoint, for the heart rate  
28 and blood pressure?

9214

1 A. Right.

2 Q. Why would Philip Morris divide up the work in any way  
3 among different people or laboratories?

4 A. Well, the program we set up, the project we set up to  
5 devise or come up with nicotine analogues -- And, again,  
6 sort of a review -- The target was a compound similar to  
7 nicotine that would give you the central-nervous-system  
8 effect without the peripheral-nervous-system effect. In  
9 other words, it wouldn't raise your blood pressure or  
10 increase your heart rate but would give you the other  
11 effects of nicotine.

12 The way we approached this was to put together a  
13 group of chemists and a group of biologists. A group of  
14 chemists, there were sort of two sections within the

15 chemistry: One were people who attempted to synthesize the  
16 compound, to make them, and another group that would verify  
17 and certified that they made what they thought they made.  
18 And that's sort of typical when you are trying to make new  
19 compounds, that you need two separate disciplines to do  
20 that.

21 I was on the side of certifying that they made what  
22 they thought they made. So once we got through the  
23 chemistry part of it, we could say, okay, this, the compound  
24 that was made, we know what it is -- We could now send it  
25 to the biology group and let them evaluate.

26 We have two groups within the biology group. Just so  
27 happened that one of the groups was looking at these  
28 compounds that we were synthesizing and certifying for its  
9215  
1 central-nervous-system effect, and another group was looking  
2 for the peripheral-nervous-system effect.

3 Q. Let me stop you right there. What was the group that  
4 was look at the central nervous system apart?

5 A. That was then Philip Morris itself, and we had had  
6 the peripheral nervous system group outside of Philip  
7 Morris.

8 Q. And as far as the Philip Morris group in-house, was  
9 that where Dr. DeNoble and Dr. Mele were found?

10 A. Yes. That's correct.

11 Q. And then the other part of the biological  
12 investigation, that is, whether it was going to work from a  
13 safety standpoint, where was that done?

14 A. That was done at the medical college of Virginia, in  
15 Richmond at N.C.V.

16 Q. Was some of that done earlier at Rochester by  
17 Dr. Abood?

18 A. Yes, it was.

19 Q. And that is A-B-O-O-D; is it not?

20 A. Yes, it is.

21 Q. Is for Dr. Abood.

22 And was it Dr. Egle who was working at the medical

23 school?

24 A. Yes.

25 Q. And do you know how that's spelled?

26 A. (No Response)

27 Q. I think it's E-G-L-E, but I'm not sure. It's not

28 like -- We'll find out, maybe.

9216

1 All right. So -- Well, let's head right to it.

2 Did it work?

3 A. We found no compound that fit the -- Our desire,

4 that is, it had the central-nervous-system effect, nervous-

5 system effect without the peripheral-nervous-system effect.

6 Some of the compounds we produced did have one without the

7 other, but none that satisfied the central without the

8 peripheral.

9 (Defendant Philip Morris's Exhibit CS-001096, Letter

10 from Egle to Pages re The Characterized Effects of Over 20

11 Investigational Compounds was Marked For Identification.)

12 Q. BY MR. BARRON: Let me show you a document that is

13 Philip Morris Exhibit CS-001096.

14 Can you just identify what that is?

15 A. It's a letter from Dr. Egle to Dr. Pages of Philip

16 Morris, and Dr. Egle, it's M.C.V. to Pages at Philip Morris,

17 talking about his investigation of these compounds on blood

18 pressure.

19 Q. And is there any --

20 And for any note-takers, how do you spell his name?

21 A. E-G-L-E. There's no 'a'.

22 Q. All right. And in fact, had he found that any of the  
23 synthesized molecules that were trying to replace nicotine  
24 in fact not only worked on the central nervous system but  
25 turned out by his tests to work in reducing the risk of any  
26 cardiac problems? Is there any reason that you know of why  
27 you at Philip Morris would not have wanted to have had that  
28 happen?

9217

1 A. All the compounds he looked at, they all increased  
2 blood pressure, he said.

3 Q. And that's what this document shows?

4 A. Yes.

5 MR. BARRON: I would move this document into  
6 evidence.

7 MR. PAUL: No objection.

8 MR. GORDON: Limiting instruction.

9 THE COURT: Limited to Philip Morris.

10 Q. BY MR. BARRON: Let me show you a couple other  
11 exhibits, Philip Morris Exhibit -- Triple zero -663, triple  
12 zero -404 -- I -- And ask you whether Philip Morris ever  
13 made its information about nicotine analogues available  
14 outside its walls to members of the public?

15 A. Yes, we did.

16 Q. Do those show in fact Philip Morris being thanked for  
17 providing the FDA, Food and Drug Administration, as well as  
18 doctors, Dr. Dietrich Hoffmann, Winston nicotine analogues  
19 that it had developed?

20 A. Yes.

21 MR. BARRON: I would move these into evidence, your  
22 Honor.

23 MR. PAUL: I haven't seen them.

24 MR. BARRON: I'm sorry.

25 MR. PAUL: I don't think I have an objection.

26 MR. BARRON: Sure I'm sorry. I just thought --

27 MR. PAUL: Thank you.

28 MR. BARRON: And also, Philip Morris Exhibit -000408,  
9218  
1 also showing essentially the same thing.

2 And I would also move this into evidence as soon as

3 counsel has had a chance to look at it.

4 MR. PAUL: I have no objection.

5 THE COURT: Received.

6 MR. GORDON: Limiting instruction, please.

7 THE COURT: Limited to Philip Morris.

8 MR. GORDON: Thank you, judge.

9 THE CLERK: That was the last three that you I.D.'d.

10 Counsel, when you say "this" --

11 MR. BARRON: Oh, all three. They would be --

12 THE CLERK: I've got the numbers. Thank you.

13 THE COURT: Thank you.

14 MR. BARRON: Thank you.

15 (Defendant Philip Morris's Exhibits PM-000404, Letter

16 from Hoffmann to Seeman re Tetrahedron on the Chemistry of

17 Nicotine Analogues; PM-000663, Letter from Seeman to Wainer,

18 FDA, forwarding samples for a study; and PM-000408, Letter

19 from Hoffman to Seeman, thanking him for sample of

20 6-methylnicotine were Marked For Identification and were

21 received In Evidence.)

22 Q. BY MR. BARRON: Okay. Let's talk about additives

23 briefly. And ask you a couple questions.

24 Can you in any distinctive way give a description of

25 why Philip Morris would use ingredients or additives,

26 whether they be flavorants or what?

27 I mean, what's going on? People hear about additives

28 all the time.



9219

1 A. I'll try to be brief.

2 Q. Anyway, to briefly discuss it.

3 A. Right. In general terms, very general terms, we have  
4 additives that affect the flavor of the smoke, so there's  
5 flavor additives.

6 There's additives that affect the physical properties  
7 of the tobacco, humectant; you want to have tobacco that's  
8 pliable and won't be real brittle and turn to dust when  
9 you're trying to make cigarettes.

10 And there's other additives that are added because of  
11 processing, what they call processing aids. They help you  
12 make material, make a material in the processing aid.

13 Is that -- Is there more you need?

14 Q. No. That's a good start.

15 We've heard about -- And I don't want to spend more  
16 time than we need to -- But you've heard about ammonia?

17 A. Um-hum.

18 Q. And there's a discussion that ammonia is found in  
19 cleaning products. So can you explain: First of all, is  
20 ammonia used by other product manufacturers in things that  
21 are consumed by people for flavorants?

22 A. Yes, it is.

23 Q. Did Philip Morris use ammonia to some extent for that  
24 reason?

25 A. Yes, we did.

26 Q. Can you tell me other examples of why ammonia was  
27 used?

28 A. It was used to help make a product, make a sheet

9220

1 product, a reconstituted leaf product that we use in our  
2 cigarettes.

3 (Defendant Philip Morris's Exhibit PM-000865, A

4 Safety Assessment of Ingredients Added to Tobacco in the  
5 Manufacture of Cigarettes by Doull, John, Frawley, George,  
6 Loomis, Squire and Talyor, submitted to Covington & Burling,  
7 was Marked For Identification.)

8 Q. BY MR. BARRON: Let me show you Philip Morris Exhibit  
9 -000865 -- And ask you to describe what this is.

10 First of all, it's dated March, 1998?

11 A. Yes, it is.

12 Q. Okay.

13 A. All right.

14 Q. What is it, please?

15 A. Well, looks like a copy of a safety assessment of  
16 ingredients added to tobacco in the manufacture of  
17 cigarettes by a number of consultants.

18 It looks like it could be Richard Carchman's copy.

19 R.A.C. initials at the top.

20 Q. And who is Richard Carchman?

21 A. He's a toxicologist at Philip Morris, or he was.

22 He's retired now.

23 Q. Did you know him?

24 A. Yes.

25 Q. Know him still?

26 A. Yes.

27 Q. And, are you familiar with, in essence, the  
28 conclusion of the independent study by people who are listed  
9221

1 here reporting on the issue of whether these additives or

2 ingredients make the cigarette any more harmful?

3 A. Yes, I am.

4 Q. What is your knowledge about that?

5 A. They concluded that they're not harmful under the  
6 conditions of use.

7 MR. BARRON: We would move that exhibit into

8 evidence, your Honor.

9 MR. PAUL: I have --

10 MR. BARRON: Or we could pass it and come back to it.

11 MR. PAUL: I only have one question about it. Maybe  
12 we can just touch on it at this break, but otherwise I have  
13 no problem.

14 THE COURT: Okay, we're going to take a ten-minute  
15 recess now. Ten minutes. Only ten minutes.

16 Please don't discuss the case.

17 (The jurors depart the courtroom at 3:30 pm.)

18 ---o0o---

19 THE COURT: You can step down.

20 THE WITNESS: Thank you, sir.

21 MR. PAUL: Your Honor, I won't keep you on the bench,  
22 because I just saw a time period in here; it turns out that  
23 it doesn't have any impact.

24 THE COURT: Okay, received.

25 MR. PAUL: I have no objection.

26 THE COURT: All right, received.

27 //////////////////////////////////

28 (Defendant Philip Morris's Exhibit PM-000865,  
9222  
1 previously Marked for Identification, was received In  
2 Evidence.)

3 (The mid-afternoon recess was taken.)

4 ---o0o---

5

6

7

8

9

10

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28